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IN THE

Supreme Court of the United States

AMERICAN NATIONAL INSURANCE COMPANY, MONUMENTAL LIFE INSURANCE COMPANY, AND THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY

Petitioners,

v.

MATTIE BRATCHER, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Federal Rule of Civil Procedure 23(b)(2) – which which provides for the certification of classes seeking injunctive relief – authorizes class certification where all class members seek damages; where at least a million class members can receive only damages; and where massive individual damages inquiries are required?

PARTIES TO THE PROCEEDINGS

In addition to the parties stated in the caption, the following parties are respondents in this proceeding:

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Berniece Scott
Warren Sonnier
Lovenia Sonnier
Mary Sue Truesdale
John Truesdale
Elizabeth Walker
Yvonne Williams
Edna Wyandon

and all similarly situated persons.

American National Insurance Company is a publicly traded company that is not owned by another corporation and does not have a parent. No publicly held corporation owns 10% or more of its stock.

Monumental Life Insurance Company is wholly owned by Capital General Development Corporation and First AUSA Life Insurance Company; the ultimate parent of these companies is AEGON nv, which is the only one of these entities that is publicly traded.

The Western and Southern Life Insurance Company is owned by Western & Southern Financial Group, Inc. which is owned by Western & Southern Mutual Holding Company. No publicly held corporation owns 10% or more of petitioner's stock.

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SCHOLARLY AUTHORITIES

Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions,* 73 Judicature 22 (1989) 22

Richard A. Epstein, *Class Actions, Aggregation, Amplification And Distortion,* 2003 U. Chi. Legal F. 475 ..... 27, 28, 29

Samuel Issacharoff, *Preclusion, Due Process, And The Right To Opt Out of Class Actions,* 77 Notre Dame L. Rev. 1057 (2002) 17, 24

Robert H. Klonoff & Edward K.M. Bilich, *Class Actions and Other Multi-Party Litigation Cases And Materials* (2000) 22

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Richard A. Nagareda, *The Preexistence Principle And The Structure Of The Class Action,* 103 Colum. L. Rev. 149 (2003) 14, 28

Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective,* 80 Cornell L. Rev. 941 (1995) 22

OTHER AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioners American National Insurance Company ("ANICO"), Monumental Life Insurance Company ("Monumental"), and The Western and Southern Life Insurance Company ("Western-Southern") (jointly, "petitioners" or "Insurance Companies") seek a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND JUDGMENTS BELOW

The court of appeals entered an order on April 2, 2004, denying petitioners' petition for rehearing and rehearing *en banc* (App. 1a-3a). The order also withdrew the court's opinion of August 13, 2003, reported at 343 F.3d 331 (5th Cir. 2003) (App. 25a-50a), "for the limited purpose of making minor adjustments in the analyses contained in parts III.A, III.B, and V," (App. 3a), and was accompanied by the revised opinion, which is reported at 365 F.3d 408 (5th Cir. 2004) (App. 3a-24a). The court of appeals' opinions reversed the district court's denial of the motion for class certification. The district court opinion is reported at 208 F.R.D. 571 (E.D. La. 2002) (App. 51a-58a).

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The court of appeals had jurisdiction under 28 U.S.C. § 1291; it granted review of the district court's order denying class certification under Fed. R. Civ. P. 23(f), and issued its decision on August 13, 2003. Petitioners' timely motions for rehearing and rehearing *en banc* were denied on April 2, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE OR RULE INVOLVED

Federal Rule of Civil Procedure 23 is set forth at App. 59a-65a.

INTRODUCTION

This case presents a mature and repeatedly acknowledged conflict among the courts of appeals concerning the appropriate standard for class certification under Fed. R. Civ. P. 23(b)(2), where, as here, the class seeks injunctive relief and money damages. Rule 23(b)(2) authorizes certification of a mandatory class (*i.e.*, a class from which no member may opt out) seeking injunctive relief where the defendant "has acted or refused to act on grounds generally applicable to the class." In contrast, Rule 23(b)(3) authorizes certification of a non-mandatory class (*i.e.*, a class action in which members receive notice and a right to opt out) seeking money damages where common issues predominate and a class action is superior to other methods of adjudication.

Two circuits, the Second and the Ninth, employ an *ad hoc* balancing test to decide whether Rule 23(b)(2) certification is appropriate when the class seeks injunctive relief and money damages. Expressly rejecting the *ad hoc* test, five other circuits examine whether injunctive relief is the "predominant" relief sought and whether any money damages sought are "incidental." With respect to the latter group, there are substantial disparities in the application of the "incidental damages" inquiry. For example, the court below considered a damages request incidental even though the court acknowledged that the *only* relief available to a substantial portion of the class would be money damages and that class members were *not* entitled "to a one-size-fits-all refund" because "individual damages will depend on the idiosyncrasies of the particular dual rate or dual plan policy" in question. App. 16a.

Critically, moreover, several courts of appeals have noted that this Court's decisions – most particularly *Ticor Title Insurance Co.* v. *Brown*, 511 U.S. 117, 121 (1994) (per curiam) – strongly suggest that certification of a Rule 23(b)(2) mandatory class seeking money damages may violate individual class members' Due Process rights and thus be unconstitutional. These circuits, however, have been unwilling to overrule their respective tests for Rule 23(b)(2) certification without more explicit instructions from this Court.

The decision below vividly illustrates the conflict and confusion in the courts of appeals. The Fifth Circuit panel acknowledged the conflict among the courts of appeals and announced that it would conduct an "incidental damages" inquiry. It then reversed a district court decision denying 23(b)(2) certification to a class of potentially millions of plaintiffs alleging race discrimination involving potentially millions of policies (some expired, some paid-up, some adjusted) under thousands of different plans, issued over many decades by 280 entities, and subject to differing limitations periods based on the actual or constructive knowledge of individual plaintiffs. The court found that injunctive relief could be predominant and damages incidental even though between 20% and 82% of class members seek *only* monetary relief, and even though class members' damages were not a "one-size-fits-all refund" and would have to be individually determined. App. 16a. This decision unlawfully exempts plaintiffs' damages claims from the Rule 23(b)(3) predominance and superiority requirements. Appearing to recognize that the individual damages issues rendered Rule 23(b)(2) certification problematic and potentially unconstitutional, the court of appeals simultaneously ordered the district court to provide notice to class members and to consider granting opt-out rights – rights provided solely under Rule 23(b)(3).

The standard for Rule 23(b)(2) certification when the class seeks money damages presents a recurring and important question. Thousands of class actions are filed each year. Rule 23(b)(2) certification is an increasingly popular option for classes seeking money damages, as it authorizes certification without satisfaction of the rigorous predominance and manageability criteria for Rule 23(b)(3) certification. Yet, the very existence of aggregated claims for millions or perhaps billions of dollars is devastating and exerts coercive pressure on defendants to settle, rather than bet the business on prevailing at trial. To decide the critically important and often dispositive question whether to certify a Rule 23(b)(2) class seeking money damages, a district court must know what standard to apply; yet the federal courts are in conflict on this fundamental question. This results in both forum shopping for the jurisdiction most likely to certify the class, and fundamental unfairness to plaintiffs and defendants as classes are certified in some circuits that would not be certified in others. Substantial variations in what this Court and Congress intended to be a uniform, federal procedural rule create manifest injustice and warrant this Court's attention, especially under a Rule as important and oft-utilized as Rule 23. In addition, current interpretations of Rule 23(b)(2) violate Rule 23, which is structured to create distinctions between classes seeking injunctive relief and those seeking money damages.

In sum, there is a long-standing conflict and substantial confusion about the construction of Rule 23, an important Rule of Federal Procedure that is frequently applied by federal district courts. This issue cries out for this Court's attention and resolution.

STATEMENT OF THE CASE

1. Federal Rule of Civil Procedure 23(b) authorizes three different types of class actions, two of which are implicated in

this case. Relevant here, a class may be certified under Rule 23(b)(2) when

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Alternatively, a class may be certified under Rule 23(b)(3) if "'questions of law or fact . . . predominate over any questions affecting only individual members'" and proceeding by way of a class action is deemed preferable to "'other available methods for the fair and efficient adjudication of the controversy.'" *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 607 nn.10 & 12 (1997). Rule 23(c)(2) expressly provides that individual members of a class certified under Rule 23(b)(3) must be afforded notice and the opportunity to opt out of the class action, but Rule 23 makes no provision for opt-out by members of Rule 23(b)(2) classes.

2. Plaintiffs in three consolidated, multi-district proceedings filed class actions, alleging that the Insurance Companies paid "lower benefits and charg[ed] higher premiums to blacks in the sale of low-value life insurance" in violation of 42 U.S.C. §§ 1981 and 1982. App. 3a. These low-value policies generally fall into a broader category known as "industrial life policies," which have "face amounts of $2000 or less and require small weekly or monthly premiums." *Id.* at 4a. The plaintiffs allege that the Insurance Companies charged African-American policyholders higher premiums for the same benefits ("dual rates") and that the Insurance Companies placed African-American policyholders in substandard plans offering fewer or lower benefits than comparable plans sold to white policyholders ("dual plans"). *Id.* For relief, plaintiffs sought an injunction, prohibiting the collection of any discriminatory rates that remained in force and the reformation of any discriminatory plans that remained in force; plaintiffs also sought millions of dollars in restitution

for past premium overcharges or benefit underpayments. *Id.* at 5a.

Insurance underwriting standards and classifications of risk are guidelines by which insurance companies try to assess whether a particular applicant is a good, bad or questionable risk. Insurance companies have always charged differing rates for different risks. For example, men and smokers pay higher rates for life insurance than women and non-smokers based on their differing life expectancies. Decades ago many insurance companies, using underwriting standards based on government census data reflecting significant differences in African-American and Caucasian life expectancies, charged different rates to African-Americans and Caucasians. App. 4a n.2; Mire Decl. ¶¶ 76-78. Thus, the pricing of industrial life policies was based on underwriting standards, risk classifications, as well as on the plan of insurance, the date of purchase, the age of the insured at the time of purchase, the product's coverage (if any) of built-in benefits such as loss of sight or limb, and the provision (if any) for periodic dividends.

The Insurance Companies actually "comprise over 280 companies," as a result of acquisitions of other companies and blocks of business throughout the 1900s. App. 4a. Commencing in the 1920s and concluding by the 1970s, the Insurance Companies issued thousands of different types of industrial life insurance products – products that varied company by company, time period by time period, and plan by plan. Since then, a substantial percentage of the challenged policies have been either terminated, paid up, or adjusted. *Id.* at 5a. Indeed, it is undisputed that at least one million industrial life policies issued by the Insurance Companies have been terminated (due to lapses, surrenders, maturities, and deaths); the court below recognized that the number might be as high as 4.6 million. *Id.* And, it is further undisputed that with respect to policies reflecting possible race-based underwriting, "as early as 1988, some [of the

Insurance Companies] voluntarily adjusted premiums and/or death benefits to equalize the amount of coverage per premium dollar." *Id.*

In opposing class certification, the Insurance Companies demonstrated that the class could not be certified in light of the substantive issues to be litigated. The Companies' indicated that they intended to argue on the merits, *inter alia*, that (i) the rates and policies were justified by valid insurance underwriting and sound actuarial calculations; (ii) state regulators were aware of the policies and the companies' use of the underlying mortality tables related to race; (iii) the rates and policies offered to African-Americans and Caucasians produced virtually identical profits; (iv) many of the policies had already been adjusted; and (v) many of the allegedly race-based dual rates were the result of a widespread practice of socioeconomic underwriting – *viz.*, underwriting based on the insured's medical condition, income, job classification, job history, and other facts which have an impact on mortality risks and persistency (the likelihood of steady premium payments). App. 6a-8a; Mire Decl. ¶¶ 46-59.

In addition, the Companies asserted an affirmative statute of limitations defense – specifically, that there was no basis for tolling the limitations period because the Companies' pricing practices were known to state regulators and widely publicized. Indeed, since the 1920's, national, local and African-American media outlets have reported that African-Americans paid more than Caucasians for similar coverage. App. 20a-21a.

3. In light of the nature of plaintiffs' claims and the Insurance Companies' responses, the Insurance Companies opposed plaintiffs' request for Rule 23(b)(2) certification of a plaintiff class of "'[a]ll African-Americans who own, or owned at the time of policy termination, an industrial life insurance policy that was issued as a substandard plan or at a substandard rate,'" App 6a.

The district court denied certification under Rule 23(b)(2) for three reasons. First, the court determined that monetary relief would predominate over injunctive relief. The court observed that "many of plaintiffs' proposed class members such as those who have already had their policies adjusted by the defendants, or those whose policies have lapsed, or those on which death benefits have been paid, would not benefit *in any way* from the injunctive relief requested." App. 54a. (emphasis supplied.) The court further explained that "injunctive relief will not benefit anyone seeking to buy Industrial life insurance in the future because the defendants no longer sell so-called industrial life insurance and have not done so since the mid-1980's." *Id.* at 55a. The court also noted the monetary relief sought would not "flow directly" to the class as a whole: "many and a variety of hearings would be required to determine personalized harm to each individual plaintiff because of the mass of policies involved, differing underwriting practices among some 280 companies, differing built in benefits, account dividends, and age at policy issuance." *Id.*

Second, the district court held that the class proposed would not be cohesive because of "the number of different insurance companies that issued the policies in question" with "different underwriting and pricing procedures, involving perhaps a million policyholders." App. 56a. The court would have to "consider: 1) the plaintiff's age at the time the policy was issued; 2) whether the policy had built in benefits, such as a loss of limb benefit; 3) whether the premium as calculated was race-neutral; and 4) whether any dividends were paid on any policies." *Id.* In addition, the court would have to "consider the policies that had lapsed or that had been adjusted by defendants," because "[t]here would need to be a determination of which policies had been adjusted, the amount of the adjustment and whether the adjustment was sufficient." *Id.* at 56a-57a. Indeed, the court characterized

plaintiffs' claim that damages could easily be determined classwide as "unrealistic at best." *Id.* at 57a.

Finally, the court held that it would have to hold individual hearings for class members on "a seriously asserted statute of limitations issue," because all of plaintiffs' claims are time barred on their face. App. 57a. The court pointed out that the Insurance Companies "have introduced evidence that information concerning the insurance practices at issue has been readily available in the national and local media for many years," citing "newspaper and magazine articles and television reports from different areas of the country." *Id.* Moreover, the court explained "different state laws have different time-barring periods" and different laws concerning "fraudulent concealment and overt misrepresentations." *Id.* at 58a.

4. A divided panel of the Fifth Circuit reversed. First, the court of appeals rejected the Insurance Companies' argument that the proposed class definition included not only African-Americans who had purchased dual rate policies or dual plan policies, but also those "who were forced into substandard plans, or forced to pay substandard rates, through the use of non-racial underwriting factors." App. 7a. The court stated that to hold plaintiffs "to the plain language of the class definition would be overly formalistic," and held that plaintiffs had narrowed the application of the class definition to "overt race-distinct dual premiums and plans." *Id.*

The court then turned to the propriety of Rule 23(b)(2) certification based on plaintiffs' "request for an injunction prohibiting the further collection of discriminatory premiums." App. 9a. The court noted that Rule 23(b)(2) certification "'does not extend to cases in which the appropriate final relief relates exclusively or *predominantly* to money damages.'" *Id.* at 10a (quoting Fed. R. Civ. P. 23 advisory committee notes). But, the court overruled the district court's conclusion that in light of the number of policies that had lapsed, been paid, or been voluntarily

adjusted, the claim for injunctive relief "merely serve[d] as a bootstrap" for the "primary claim" of monetary damages. *Id.* The court concluded that the district court had analyzed the case as if it were applying the legal test for Rule 23(b)(2) certification followed by the Ninth and Second Circuits, see *id.* at 10a & n.10 (citing *Molski* v. *Gleich*, 318 F.3d 937, 950 (9th Cir. 2003), *Robinson* v. *Metro-North Commuter R.R.*, 267 F.3d 147, 163-64 (2d Cir. 2001)), instead of the different approach taken by the Fifth Circuit in *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). The court found that "defendants' and plaintiffs' experts estimate that between one million and 4.5 million of 5.6 million issued [industrial] policies remain in force," and concluded that "[a]lthough the exact number of class members continuing to pay discriminatory premiums is unknown," the proportion is sufficient . . . that the class as a whole is deemed properly to be seeking injunctive relief." App. 12a.

The court next rejected the Insurance Companies' argument that "plaintiffs' request for notice and opt-out [for class members] is a tacit admission that rule 23(b)(2) certification is inappropriate." App. 12a. The court believed that Fed. R. Civ. P. 23(d) authorizes the district courts "to provide notice and opt-out for any class action" and therefore that rule 23(b)(2) certification "should not be denied on the assumption that a rule 23(b)(3) class is the only means by which to protect class members" seeking monetary damages. *Id.* at 13a. The court also stated, however, that although "rule 23 does not explicitly extend these safeguards to rule 23(b)(2) classes, due process requires the provision of notice where a rule 23(b)(2) class seeks monetary damages." *Id.* at 12a-13a. On the other hand, the court noted that there is "no absolute right of opt-out in a rule 23(b)(2) class, 'even where monetary relief is sought and made available,'" *id.* at 13a. Thus, the court mandated that notice be provided and that opt-out rights be considered. The court rejected all arguments that Rule 23(b)(2) class certification was inappropriate because

"between one million and 4.5 million of 5.6 million" industrial life policies had terminated and thus a substantial portion of the class sought only money damages. *Id.* at 12a. The court stated that "to deny certification on the basis that the damages claims would be better brought as a rule 23(b)(3) class serves no function other than to elevate form over substance" and that Rule 23(b)(2) was not adopted "to compartmentalize claims for damages under rule 23(b)(3)." *Id.* at 14a & n.16.

Finally, the court rejected the district court's finding that "the requested monetary relief does not flow from liability to the class as a whole" and that its determinations would require "many and a variety of" personalized hearings. App. 15a. The court recognized that:

> This is not a case in which class members are entitled to a one-size-fits-all refund; assuming liability is established, individual damages will depend on the idiosyncrasies of the particular dual rate or dual plan policy. For example, the age at which a class member purchased a dual rate policy will have an impact on how long the insured paid premiums and consequently on the amount of damages. Some policies contain built-in benefits covering occurrences outside of death, such as loss of limb; others pay periodic dividends. As we have observed, some defendants, beginning in 1988, voluntarily adjusted premiums and benefits for some policies sold on a race-distinct basis. [*Id.* at 16a.]

The court believed that this problem could be solved with restitution grids (though plaintiffs had not produced the necessary grids). The court seemed to accept the Insurance Companies' statement that thousands of grids would be required (while ignoring their demonstration that even thousands of grids would not ultimately suffice), but nonetheless concluded that this was a "'mechanical task.'" App. 18a.

The court also refused to preclude class certification on the ground that individualized hearings would be necessary to decide whether a plaintiff's claim is barred by the statute of limitations. The court noted that "defendants have not sold dual plan or dual rate policies since the 1970's" and that "some class members purchased their policies as far back as the 1940's." App. 19a. Nonetheless, the court found that "[d]oubtless most class members, the majority of whom are poor and uneducated, remain unaware of defendants' discriminatory practices." *Id.* Further the court reasoned:

> To hold that each class member must be deposed as to precisely when, if at all, he learned of defendants' practices would be tantamount to adopting a *per se* rule that civil rights cases involving deception or concealment cannot be certified outside a two-or three-year period. [*Id.* at 20a.]

The court thus held that "a rebuttable presumption that the class lacks knowledge of defendants' concealment is warranted at the class certification stage." App. 44a. And, the court further held that the issue of whether the plaintiffs received constructive notice through the widespread publicity about defendants' policies could be decided on a national, classwide basis, rather than on a regional or individual basis. *Id.* at 20a-21a.

5. Judge Clement dissented. She found that there are two circumstances in which Rule 23(b)(2) certification is inappropriate:

First, Rule 23(b)(2) does not provide for procedural safeguards like notice and opt-out rights, primarily because the class is "presumed to be 'homogenous and cohesive' due to 'the *group* nature of the harm alleged and the *broad* character of the relief sought.'" App. 47a. Therefore, Judge Clement explained, if notice and/or opt-out rights seem to be necessary, certification under Rule 23(b)(2) is likely to be inappropriate.

Second, Rule 23(b)(2) only permits monetary relief in the form of "uniform group remedies." Uniform group remedies are consistent with Rule 23(b)(2) for two reasons: (1) they are "'capable of computation by means of objective standards,'" thus avoiding the need for "'complex individualized determinations'" and procedural safeguards like notice and opt-out rights, and (2) the group nature of the remedy ensures that the class remains "'homogenous and cohesive.'" App. 47a. Therefore, Rule 23(b)(2) class certification is inappropriate where the monetary relief requires a specific or time-consuming inquiry into the varying circumstances and merits of each class member's individual case.

Judge Clement found that Rule 23(b)(2) certification was clearly inappropriate here, both because notice and opt-out were likely to be required and because "a uniform group remedy is not possible" when plaintiffs seek "individualized remedies based on the specific characteristics of each policy and policyholder." App. 48a. As she noted, "[t]he parties appear to agree that: (1) the basis of Plaintiffs' suit is the issuance of hundreds of different industrial life insurance policies by several hundred Defendants over a period of 50 to 65 years; (2) Defendants ceased issuing such policies in the mid-1970s (or at the latest, the early 1980s); (3) many, if not most, of the industrial life insurance policies are no longer in effect, and (4) a large number of the remaining policies have been modified to some extent by Plaintiffs or Defendants." *Id.* at 49a. In this setting, injunctive relief is of "little consequence to many, if not most Plaintiffs." *Id.* Thus, injunctive relief does not predominate, and monetary relief is not incidental. She opined that the panel's holding would "undo the careful interplay between Rules 23(b)(2) and (b)(3)," requiring defendants "to pay what is effectively money damages, without the benefit of requiring plaintiffs to meet the rigorous Rule 23(b)(3) requirements." *Id.* at 49a-50a (quotation marks omitted).

6. The Fifth Circuit denied defendants' petition for rehearing and rehearing *en banc*, making only "minor adjustments" to its opinion. App. 3a. Judge Clement, however, added a second dissent. To her previous criticisms of the panel decision, she added that the panel decision had ignored two district court findings – *viz.*, "that money damages do not flow from liability to the class as a whole; and [] that a predominant proportion of the class does not seek injunctive relief." *Id.* at 22a. In order to certify the class, the court of appeals had effectively vacated these district court determinations without finding any "clear error" by the district court. Judge Clement stated that both of the district court's findings were well supported in the record, and therefore that the majority also erred in reversing the district court's denial of class certification on this basis. *Id.* at 22a-24a.

REASONS FOR GRANTING THE PETITION

I. THE PROPER STANDARD FOR RULE 23(b)(2) CERTIFICATION IS THE SUBJECT OF AN ACKNOWLEDGED, FULLY DEVELOPED CONFLICT AMONG THE COURTS OF APPEALS, FURTHER COMPLICATED BY DECISIONS OF THIS COURT.

There now exists a universally recognized, fully mature conflict among the courts of appeals concerning the proper standard for Rule 23(b)(2) certification of a class that seeks injunctive relief and monetary damages. All Circuits agree that the analysis of this issue commences with the Advisory Committee's vague instruction that Rule 23(b)(2) certification "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages," Fed. R. Civ. P. 23 advisory committee's note; but with that, all agreement ends. "Judicial efforts to give practical meaning to this passage have led to a dizzying array of approaches." Richard A. Nagareda, *The Preexistence*

Principle And The Structure Of The Class Action, 103 Colum. L. Rev. 149, 236 n.368 (2003). As the court below expressly recognized, the courts of appeals are polarized in their methodology for determining when, and under what conditions, Rule 23(b)(2) certification is appropriate. See App. 10a & n.10 (explaining that the Fifth Circuit's test, endorsed by at least four other circuits, had been "reject[ed]" by the Ninth and Second Circuits).

In *Allison*, the Fifth Circuit held that:

> monetary relief predominates in (b)(2) class actions *unless it is incidental to* requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief. [151 F.3d at 415 (citation omitted) (first emphasis added).][1]

This formulation of the test for certifying a Rule 23(b)(2) class has been adopted by the Third, Sixth, Seventh and Eleventh Circuits. See *Barabin* v. *Aramark Corp.*, No. 02-8057, 2003 U.S. App. Lexis 3532 (3d Cir. Jan. 24, 2003); *Coleman* v. *General Motors Acceptance Corp.*, 296 F.3d 443, 446-47 (6th Cir. 2002); *Jefferson* v. *Ingersoll Int'l, Inc.*, 195 F.3d 894 (7th Cir. 1999); *Murray* v. *Auslander*, 244 F.3d 807 (11th Cir. 2001).

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[1] Three objective factors are utilized in making this determination: (1) whether damages are "concomitant with, not merely consequential to, class-wide injunctive or declaratory relief"; (2) whether damages are "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances"; and (3) whether determining liability for damages would require "additional hearings to resolve the disparate merits of each individual's case" or would "introduce new and substantial legal or factual issues, [or] entail complex individualized determinations." *Allison*, 151 F.3d at 415.

The Second and Ninth Circuits, however, have explicitly rejected *Allison's* objective analysis in favor of an *ad hoc* balancing approach that focuses on the subjective purpose of the class. See *Robinson* v. *Metro N. Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001); *Molski* v. *Gleich*, 318 F.3d 937 (9th Cir. 2003). Under this approach, a district court must

> assess whether (b)(2) certification is appropriate in light of the "relative importance of the remedies sought, given all of the facts and circumstances of the case." The district court may allow (b)(2) certification if it finds in its "informed, sound judicial discretion" that (1) "the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed," *Allison*, 151 F.3d at 430 (Dennis, J., dissenting), and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy. [*Robinson*, 267 F.3d at 164 (citation and footnote omitted, alteration in original).]

The Second Circuit further explained that:

> [a]lthough the assessment of whether injunctive or declaratory relief predominates will require an ad hoc balancing that will vary from case to case, before allowing (b)(2) certification a district court should, at a minimum, satisfy itself of the following: (1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits. Insignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery. [*Id.* (footnote omitted).]

In the view of the Second and Ninth Circuits, the *ad hoc* approach gives district courts the freedom to exercise their discretion to achieve judicial efficiency on a case-by-case basis, unlike the "one-size-fits-all" approach adopted by the other courts of appeals. See *id.* at 165-66; *Molski*, 318 F.3d at 950. These two Circuits recognize that their test might compromise the Due Process rights of absent class members, but suggest that this concern be addressed by requiring notice and the opportunity to opt out of the damages phase of a proceeding. See, *e.g.*, *Robinson*, 267 F.3d at 166.

The conflict is even worse than it first appears. The *ad hoc* balancing approach of the Second and Ninth Circuits allows such substantial leeway in certification decisions that it fails meaningfully to constrain district courts' discretion and provides no certainty to parties. Indeed, "the term 'ad hoc balancing' is usually a term of derision for unprincipled adjudication rather than a label for an inquiry of constitutional dimensions." Samuel Issacharoff, *Preclusion, Due Process, And The Right To Opt Out of Class Actions*, 77 Notre Dame L. Rev. 1057, 1072 (2002). The *ad hoc* approach inevitably creates unpredictable and inconsistent results.

Equally to the point, there is substantial confusion and conflict in the application of both the "incidental damages" and *ad hoc* tests among the Circuits. This Court's decisions questioning the constitutionality of certifying a class seeking monetary damages under Rule 23(b)(2) are the source of that conflict. In response, some Circuits now authorize Rule 23(b)(2) certification for classes seeking injunctive relief and money damages and *also require that class members be provided with notice and the right to opt out* (the rights conferred under Rule 23(b)(3)).

In *Ticor Title Insurance Co.* v. *Brown*, 511 U.S. 117 (1994), in dismissing a writ of certiorari as improvidently granted, this Court said that there is "at least a substantial possibility" that "in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which

permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not." *Id.* at 121. Similarly, *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), leaves the firm impression that a mandatory class seeking monetary damages should not be certified under Rule 23(b)(2) because such a class compromises the Due Process rights of absent class members. See, *e.g.*, *id.* at 846-47 (the "inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class" because the "legal rights of absent class members . . . are resolved regardless of either their consent, or . . . their express wish to the contrary"). See also *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811 n.3 (1985) (suggesting a constitutional right to opt out of class actions "which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments").

In light of *Ticor*, *Ortiz*, and *Shutts*, several Circuits are troubled by the possibility that certification of a Rule 23(b)(2) class seeking both injunctive and monetary relief may never be appropriate, because it binds all class members, without the safeguards of notice and the opportunity to opt out of the suit. See, *e.g.*, *Parker* v. *Time Warner Entm't Co.*, 331 F.3d 13, 23 (2d Cir. 2003) ("I am somewhat doubtful about the possibility of a *(b)(2)* class that would include monetary claims") (Newman, J., concurring).[2] Without clear guidance

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[2] *See also Coleman*, 296 F.3d at 447 ("Notwithstanding this apparent consensus that money damages are recoverable to some extent in a Rule 23(b)(2) class action, the Supreme Court has repeatedly expressed concern over the constitutionality of certifying a mandatory class that includes claims for money damages."); *Jefferson*, 195 F.3d at 897 ("It is an open question in this circuit – and in the Supreme Court – whether Rule 23(b)(2) *ever* may be used to certify a no-notice, no-opt-out class when compensatory or punitive damages are in issue." (citations omitted)); *Molski*, 318 F.3d at 948 ("[W]e recognize the Court's growing concerns regarding the certification of mandatory classes when monetary damages are involved.").

from this Court, however, the Circuits have felt constrained to follow existing precedent:

> We recognize that the Supreme Court's decision in [*Ticor*] casts doubt on the proposition that class actions seeking money damages can be certified under Rule 23(b)(2). . . . Were we writing on a clean slate, we might give further consideration to the extent to which monetary relief is available at all in 23(b)(2) class actions. However, in the absence of a clearer statement by the Supreme Court or en banc reconsideration of the issue, this panel is bound by circuit precedent. [*Allison*, 151 F.3d at 411 n.3].

Moreover, to address the constitutional issues raised by *Ortiz*, *Ticor*, and *Shutts*, the courts have devised a confusing array of approaches in applying Rule 23 to classes seeking both injunctive and monetary relief. Some courts permit divided certification, where the damages claims are certified under Rule 23(b)(3) and the equitable claims are certified under Rule 23(b)(2).[3] Some courts allow the certification of all issues under Rule 23(b)(2), but require that class members be provided with notice and the opportunity to opt out.[4] The decision below endorses the latter approach where Due Process poses an impediment to Rule 23(b)(2) certification. App. 12a-14a. The United States, in contrast, has taken the position that "Rule 23 plainly authorizes opt-outs only for classes certified under Rule 23(b)(3). No opt-out procedure is

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[3] The Eleventh Circuit has indicated that district courts may exempt non-incidental damages claims from class certification under Rule 23(b)(2), thus splitting the issues. *Murray*, 244 F.3d at 812. The Second and D.C. Circuits have also endorsed such a practice. *See Robinson*, 267 F.3d at 167; *Eubanks* v. *Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997).

[4] The Second Circuit authorizes a district court certifying a class under Rule 23(b)(2) to afford absent class members notice and opt-out rights for the damages portions of the proceedings. *Robinson*, 267 F.3d at 166, 167-69. This is also true in the Ninth and D.C. Circuits. *See Molski*, 318 F.3d at 950; *Eubanks*, 110 F.3d at 96.

authorized for Rule 23(b)(2) (or Rule 23(b)(1)) classes." Brief for the U.S. in Opposition at 11, *Thomas* v. *Albright*, 525 U.S. 1033 (1998) (No. 98-326).

These hybrid applications of Rule 23 directly respond to this Court's constitutional concerns about the certification of Rule 23(b)(2) and other mandatory classes. Fearful that class actions cannot satisfy the Rule 23(b)(3) predominance and superiority standards and anxious to certify some sort of class, the courts of appeals blur the distinctions between the different types of class action, jeopardizing the careful balance achieved by the drafters of the Rule. See *infra* at 23-28. Indeed, the decision below expressly endorses the elimination of the line between (b)(2) and (b)(3) classes. See App. 14a ("to deny certification on the basis that the damage claims would be better brought as a rule 23(b)(3) class serves no function other than to elevate form over substance. Indeed the interests of judicial economy are best served by resolving plaintiffs' claims for injunctive and monetary relief together"). How else could a court contemplate Rule 23(b)(2) certification of a class when it is undisputed that a substantial portion of the class – between 20% and 82% (*id.* at 12a-14a) – will not benefit from injunctive relief because it seeks *only* money damages?

The fundamental conflict on the standard for certifying a Rule 23(b)(2) class alone warrants this Court's intervention. When the confused multiplicity of responses to this Court's constitutional concerns voiced in *Ticor*, *Ortiz*, and *Shutts* are added to the mix, the necessity for this Court's clarification becomes overwhelming. This case will permit the Court to establish the appropriate standard for Rule 23(b)(2) certification, to clarify the line between (b)(2) and (b)(3) classes, and to instruct the courts of appeals on the appropriate accommodation of constitutional concerns in applying Rule 23.

II. THE PROMPT RESOLUTION OF THE RECURRING AND IMPORTANT QUESTION PRESENTED IS CRITICAL TO THE FAIR AND UNIFORM ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS.

Class actions have been one of the most important developments in civil litigation in the past 35 years. They touch virtually every area of substantive law, involve issues of enormous potential economic or social import, and often call into question the structure, operation, and survival of entire businesses or industries. There are thousands of class actions pending, and more than 3000 additional class actions are filed in federal district courts every year.[5]

Because Rule 23(b)(2) classes "do not need to meet the more stringent 23(b)(3) requirements of predominance and superiority, certification under the mandatory classes is viewed as easier, and more desirable." Linda S. Mullenix, *No Exit: Mandatory Class Actions In The New Millennium And The Blurring Of Categorical Imperatives*, 2003 U. Chi. Legal F. 177, 215; see *id.* at 218. Thus, class counsel seeking money damages increasingly recast their allegations as claims for injunctive relief in order to obtain certification under Rule 23(b)(2). *Id.* at 217-24.

In a multitude of cases, affecting thousands, if not millions, of individuals, trial judges must decide whether to certify a proposed class under Rule 23(b)(2). To do so fairly and appropriately, they must know what a plaintiff is required to prove and what the court must find in order to satisfy the Rule's requirements. But it is precisely this question on which the federal courts are in conflict.

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[5] The annual reports on the Judicial Business of the United States Court produced by the Judicial Conference contain statistics on class actions. They are available at http://www.uscourts.gov/judbususc/judbus.html (last visited July 1, 2004).

Moreover, roughly two-thirds of the States model their class actions rules on Rule 23. See Robert H. Klonoff & Edward K.M. Bilich, *Class Actions and Other Multi-Party Litigation*: *Cases And Materials* 439 (2000). Accordingly, these states vicariously experience the federal court's conflict on this recurring question. And, to the extent the conflict has constitutional implications, see *supra* at 17-19 & *infra* at 24, the states' application of their Rule 23 analogues presents a federal question. So long as widespread uncertainty about the Rule 23(b)(2) standard exists, the issue will frequently recur and consume not only litigants' resources but also scarce judicial resources, particularly in light of the availability of interlocutory appeal under Rule 23(f).

In addition, the overwhelming consequences of class certification increase both the frequency with which the issue recurs and the importance of the certification decision. Class certification raises the stakes of litigation exponentially, and often determines whether a case will settle, be tried, or simply disappear. Indeed, the certification of a large class "may so increase the defendant's potential damages liability and litigation costs that it will be coerced to settle a case without regard to the merits of his defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). See also Fed. R. Civ. P. 23 advisory committee's note ("[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"); *Manual for Complex Litigation (Third)* § 33.26 n.1056 (2000).[6] That is why Rule 23

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[6] Indeed, as an empirical matter, aggregation of claims makes it more probable that a defendant will be found liable and results in significantly higher damage awards. *See Manual for Complex Litigation* § 33.26 n.1056; Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions,* 73 Judicature 22 (1989). *See also* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 & n.85 (1995).

authorizes class certification only if, after a "rigorous analysis," the district court "finds" that the prerequisites for certification have been met. *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 161 (1982).

The ubiquity and importance of Rule 23, in combination with the coercive effects of class certification, make conflict and uncertainty in its application particularly intolerable. The Federal Rules of Civil Procedure are intended to establish uniform treatment of all procedural matters in federal cases. Conflicting and chaotic interpretation and application of these Rules is fundamentally unfair to litigants in class cases. Neither plaintiffs nor defendants should be confronted with less favorable rules depending upon whether a nationwide class action is brought in New York, New Orleans, Chicago, or Los Angeles. The current lack of uniformity simply encourages unseemly forum shopping by plaintiffs eager to leverage class certification into coercive settlements. This problem is particularly acute in class actions because plaintiffs often have limitless options as to where to bring the lawsuit. Thus, the persistence of materially conflicting standards among the Circuits unjustly allows plaintiffs to choose the certification standard most favorable to them.

Finally, the courts of appeals' interpretations of Rule 23 contravene the meaning and intent of the Rule and create fundamentally unfair and potentially unconstitutional results. Rule 23's structure reflects an underlying concern for the varying nature of the interests of class members participating in a class action, class members who do not participate, and defendants, depending upon the nature of the injury and the relief sought. Both that concern and that structure have been hopelessly compromised by the current state of the law applying Rule 23(b)(2).

Rule 23(b)(2) was intended to address cases where broad, classwide injunctive relief is necessary, while Rule 23(b)(3) is intended to address large-scale litigation for money damages. Under Rule 23(b)(2), class members forfeit their individual

legal rights to litigate damages claims because a (b)(2) class is presumed to be a homogenous, cohesive group with few, if any, conflicting interests among its members. This homogeneity breaks down once significant and differentiated monetary relief is sought by class members.[7] In contrast, Rule 23(b)(3) class members must receive notice and opt-out rights so that they can pursue their claims for money damages in individual lawsuits without being bound by membership in a class. These requirements are based on constitutional considerations of Due Process that are implicated by actions for money damages. See *Ticor Title Ins. Co.*, 511 U.S. at 121; *Ortiz*, 527 U.S. at 844-48; *Shutts*, 472 U.S. at 811-12.

But Rule 23's structure – *viz.*, the boundary between (b)(2) and (b)(3) classes – is vanishing. First, classes that seek money damages are being certified under (b)(2), instead of under (b)(3). The decision below exemplifies this development. All parties, the district court, and the court of appeals have agreed that a substantial portion of industrial life policies have been terminated (between 20% and 82%) and that class members with terminated policies would not receive *any* benefit from injunctive relief. App. 9a-14a. Yet the court held that even in that setting, injunctive relief may

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[7] In the paradigm case for injunctive relief against wrongful governmental or institutional actions, the individual plaintiff does not have an exclusive right to assert and control the outcome of litigation of an autonomous legal claim; that individual is a symbol of the harm caused by the conduct. *See* Issacharoff, *supra*, at 1058-59 ("To give but the most obvious example, a school desegregation challenge may or may not succeed, but if it does it will establish the wrongful conduct directly across a group of affected school children"; "it would be nonsensical to claim that any one child has an autonomous right to an independent outcome of the litigation," because "no child has an individual stake in the outcome of that litigation separate from that of the other similarly situated children"). It is precisely because a claim for injunctive relief under 23(b)(2) does not generally belong to an individual plaintiff that the Due Process considerations giving rise to notice and opt out requirements are not problematic, when the standard for certification is properly applied.

predominate and Rule 23(b)(2) certification is appropriate, stating that because "*the proportion* [of class members that would benefit from injunctive relief] is sufficient . . . the class as a whole is deemed properly to be seeking injunctive relief." *Id.* at 12a (emphasis supplied). Rule 23 simply does not authorize (b)(2) certification of a class in which numerous members will receive *no* benefit from an injunction and benefit *"exclusively"* from receiving damages. See Fed. R. Civ. P. 23 advisory committee's note ((b)(2) "does not extend to cases in which the appropriate final relief relates *exclusively* or predominantly to money damages") (emphasis supplied).

In addition, and independently, the court of appeals reversed the denial of class certification even though plaintiffs had not calculated the money damages for class members or provided a formula for the millions of calculations. Individualized determinations are required to determine the damages of plaintiffs here; indeed, the court of appeals agreed that "individual damages will depend on the idiosyncrasies of the particular dual rate or dual plan policy." App. 16a. Even applying plaintiffs' faulty grid damages proposal, determining damages for class members would require the creation of thousands of "grids" containing a multitude of variables. *Id.* at 17a. There is also a substantial statute of limitations defense; and if any of the 280 Companies are found to have concealed their practices (despite filing policy forms and reserve calculations relying on mortality tables related to race with state regulators), then each class member's right to, and period of, tolling will have to be determined based upon when he or she obtained actual or constructive knowledge of the challenged practices. The consolidated treatment of class members' claims thus cannot be reconciled with the structure of Rule 23 or the Insurance Companies' Due Process right to put on individualized defenses, including affirmative defenses. By no stretch of reason or language can the

damages in this case be deemed "incidental" to the injunction sought.[8]

Moreover, where, as here, millions of class members can only receive compensatory damages, the Due Process rights of these class members may be violated unless those class members receive notice and the right to opt out of the class. See *Ticor Title Ins. Co.*, 511 U.S. at 121. As noted, several courts of appeals purport to cure the Due Process problems by *both* (a) certifying a class that seeks money damages under Rule 23(b)(2) *and* (b) requiring individual notice and opt-out rights – to wit, the rights provided to members of Rule 23(b)(3) classes. Indeed, in the decision below, the Fifth Circuit acknowledged its elimination of the line between 23(b)(2) and 23(b)(3) classes, citing "the futility of the district court's and the dissent's inquiry as to whether the 'prime goal' of the class is injunctive or monetary relief," App. 14a, and opining that (b)(2) and (b)(3) "work in tandem," *id.* & n.16. The court thus concluded that a class seeking monetary damages may be certified under 23(b)(2) by engrafting the notice and opt-out provisions of (b)(3) where necessary. See also *Eubanks*, 110 F.3d at 93 & n.9; *Linney* v. *Cellular Alaska P'ship*, 151 F.3d 1234, 1242 n.6 (9th Cir. 1998); 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4.15 (4th ed. 2002).

This practice is utterly inconsistent with the structure of Rule 23, which authorizes mandatory (b)(2) classes only when, and precisely because, the class seeks relief that is class-wide or that flows automatically to the class as a whole,

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[8] The court below appears to believe that it could allow 23(b)(2) certification even if there was only a hope that plaintiffs would somehow provide a formula or otherwise show that class members' damages were incidental in the future. But classes cannot be certified in the hope that plaintiffs' counsel will ultimately satisfy Rule 23's prerequisites. Those prerequisites must be met or certification must be denied. *See, e.g.*, *Falcon*, 457 U.S. at 160 ("actual, not presumed, conformance with Rule 23[ ] remains . . . indispensable").

without individualized determinations of entitlement, amount, or affirmative defenses. See *Amchem*, 521 U.S. at 620 ("[c]ourts are not free to amend a rule outside the process Congress ordered"). The "doctrinal incoherence has blurred the categorical distinctions among class categories that the Advisory Committee carefully promulgated in 1966. Therefore, the entire class action rule has been rendered analytically incoherent. It has become increasingly difficult to distinguish among the 23(b)(1), (b)(2), and (b)(3) class categories in any meaningful way." Mullenix, *supra*, at 181.

In addition, the device of certifying a class seeking money damages under 23(b)(2)'s lenient standard and solving the plaintiffs' constitutional problems by requiring notice and opt-out rights deprives the defendant of the protection that the more rigorous predominance and superiority standard of 23(b)(3) mandates *before certification of a massive class seeking overwhelming money damages with its attendant coercive effects*. See also Richard A. Epstein, *Class Actions: Aggregation, Amplification And Distortion*, 2003 U. Chi. Legal F. 475, 512-13 ("the ability of the defendant to mount an effective defense on liability in each individual case may be effectively compromised in order to allow the class action to proceed as such").

In sum, the fundamental problem with the court of appeals' approach is that it authorizes the circumvention of Rule 23(b)(3) requirements in cases where their application is required by Rule 23 and where they are absolutely essential to protect the Due Process rights of plaintiffs and defendants. In fact, in interpreting Rule 23(b)(2):

> The sensible rule here holds that injunctive relief could never predominate when individual damages actions are brought. That rule creates the right "bright-line" rule for this area and avoids expensive case-by-case determinations. On that view, Rule 23(b)(2) certification becomes permissible only where the plaintiff's demand for monetary relief is limited to a demand for incidental

> damages which do not require extensive additional fact-finding, but which can be done (as with lost interest) by use of simple computational devices. [Epstein, *supra*, at 511.]

Thus, Rule 23 would be best implemented "by confining the mandatory class for injunctive or declaratory relief to – shockingly enough – claims for injunctive or declaratory relief." Nagareda, *supra*, at 235. This is not the current practice in several circuits, including the Fifth Circuit.

A final, substantial problem in the current jurisprudence of Rule 23 is that the courts distort substantive law in order to find money damages incidental. This case exemplifies that problem, too.

Here, the Insurance Companies raised a statute of limitations defense. In response, plaintiffs asserted that some of the 280 Companies comprising the Insurance Companies fraudulently concealed discriminatory rates and plans, leaving plaintiffs without knowledge of such rates and plans until recently. This situation necessarily requires a determination of whether there was concealment and of the date that individual class members gained actual or constructive knowledge of the alleged discrimination – determinations that would have precluded certification. Thus, the court of appeals decided that class members' actual or constructive knowledge of the Companies' alleged discrimination could be assessed on a national, rather than a regional or individual, basis. But see, *e.g.*, *McIntyre* v. *United States*, 367 F.3d 38, 59 (1st Cir. 2004) ("the 'knew or reasonably should have known' question must be asked individually, as to the information available to someone in each plaintiff's situation"); *id.* at 60 ("[w]here there are several plaintiffs and they do not live in the same geographical area, and public notice of the underlying facts is restricted to certain areas, geography is a factor to be considered"); *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998). The court of appeals' national approach to this issue

deprived the Insurance Companies of an affirmative defense to plaintiffs' claims.

But, the Rules of Civil Procedure cannot alter substantive law in this way. See Rules Enabling Act, 28 U.S.C. § 2072(b). Here, "[t]he procedural tail has wagged the substantive dog. The aggregation of claims has resulted in a powerful distortion of the substantive law in ways that systematically favor plaintiffs over defendants in contradiction to the basic model that should govern these cases." Epstein, *supra*, at 514.

* * * *

Rule 23 is a critically important procedural rule, not least because of the substantial, often determinative effect that decisions under that Rule have on the merits of important litigation affecting hundreds or, as here, millions of parties with claims alleged to involve staggering sums. A conflict concerning an important aspect of Rule 23's interpretation and application is particularly worthy of this Court's review. The specific conflict that exists on the proper standard and criteria for certification under Rule 23(b)(2) undermines the Rule's purpose, for it has added uncertainty and further unfairness to the coercive force of a certification order and corrupted the intended structure and administration of Rule 23.

CONCLUSION

The petition for a writ of certiorari should be granted.

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